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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act Of 1992 Horizontal Ownership Limits	MM Docket No. 92-264
In The Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Review of the Commission's Cable Attribution Rules	CS Docket No. 98-82

**OPPOSITION OF AT&T CORP. AND MEDIAONE GROUP, INC.
TO MOTION TO VACATE STAY OF ENFORCEMENT
OF HORIZONTAL OWNERSHIP LIMITS**

AT&T Corp. ("AT&T") and MediaOne Group, Inc. ("MediaOne") hereby oppose the August 17, 1999 Motion To Vacate Stay of Enforcement of Horizontal Ownership Limits ("Motion") filed by Consumers Union, Consumer Federation of America, and Media Access Project (collectively "CU"). CU claims that changed circumstances, including the proposed transfer of MediaOne's licenses and authorizations to AT&T, warrant immediate enforcement of the horizontal ownership rule that the Commission is currently reconsidering and that has been stayed since 1993 when the statutory provision that authorized it was held unconstitutional. The

Commission rejected the same request by CU just last year. And it would plainly be even more unwarranted and arbitrary to lift the stay now given that: (1) the Commission has proposed to change the stayed rule to better reflect competitive realities; (2) the judicial proceedings on which the stay was based are still ongoing; (3) the Commission has just represented to the court of appeals that judicial review of the stayed rule is premature precisely *because* the rule is stayed and under reconsideration; and (4) changes in the competitive, regulatory and legal landscape, if anything, make it likely that the Commission will significantly change the stayed rule (or if it does not, less likely today than in 1993 that the Court of Appeals will affirm that rule).

Certainly, the pendency of applications by AT&T and MediaOne to transfer MediaOne's licenses and authorizations to AT&T provides no justification for lifting the stay. AT&T and MediaOne will demonstrate in their reply comments in the transfer of control proceeding that CU's attacks on the proposed transfers are baseless. As explained in the Public Interest Statement that accompanied the applications, the proposed transfers pose no threat to competition or consumers in any market, and should not be precluded by the considerations that underlie the stayed rule. To the contrary, because of the complementary nature of AT&T's and MediaOne's assets, the combined entity will be able to bring local telephone service choice and competition to millions of consumers in MediaOne service areas far more quickly and effectively than either company could separately. But whatever the nature of the threat CU may perceive, it cannot seriously be characterized as "imminent." Motion at 3. The proposed transfers will not occur until the Commission addresses any issues raised with respect to the transfers and authorizes the transfers. The Motion should thus be denied.

ARGUMENT

In its *Second Report and Order,*[1] the Commission voluntarily stayed (the "Stay") the effectiveness of its cable horizontal ownership rule, 47 C.F.R. § 76.503, pending a final resolution of *Daniels Cablevision, Inc. v. United States,*[2] which held unconstitutional the statutory provision authorizing the rule. Last year, in its *Second Order on Reconsideration*, the Commission rejected requests by CU and others that it lift the Stay, ruling that the Stay should be retained "[i]n light of the continuing pendency of the judicial proceedings relating to the underlying [statutory] provision."[3] In the same order, the Commission both proposed a new horizontal ownership formula that would "provide a more accurate measure of . . . market power" and sought comment on whether the existing rule's 30 percent limit should be changed. *Id.* ¶¶ 78-81, 84.

The judicial proceedings underlying the Stay remain pending. The Commission filed its brief in the consolidated challenges to the statute and the rule less than two weeks ago.[4] Faced with the difficulty of defending a rule that it has already tentatively recognized must be changed, the Commission urged the Court of Appeals not to reach the merits of challenges to the rule

[1] Second Report and Order, *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 8565 (1993).

[2] 835 F. Supp. 1, 10 (D.D.C. 1993).

[3] Memorandum Op. and Order on Recon. and Further Notice of Proposed Rulemaking, *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd. 14462, ¶ 75 (1998); *see also id.* ¶ 3 ("In this *Second Order on Reconsideration*, the Commission . . . denies the motion to lift the voluntary stay on enforcement of that limit").

[4] Brief for the FCC and the United States in *Time Warner Entertainment Company, L.P.* v. *FCC*, No. 94-1035 *et al.* (D.C. Cir., filed August 13, 1999).

"[p]articularly since [it] remains voluntarily stayed by the Commission." *Id.* at 43-44 ("there is no reason for this Court to address [the petitioner's] arguments unless and until the Commission denies reconsideration of those aspects of the subscriber limit rule and orders that the rule go into effect").

As the party seeking to change the *status quo*, CU, of course, bears the burden of demonstrating both that the stayed rule is likely to survive and that the balance of harms strongly favors lifting the stay in the interim.[5] CU has failed to make either showing, and the Motion should accordingly be denied.

A. Likelihood of Success

Contrary to CU's claims, changes in the competitive, regulatory and legal landscape since the Commission imposed the stay in 1993 make it *less* likely today that the court of appeals will affirm the stayed horizontal ownership rule. In 1993, the district court in *Daniels Cablevision* held that horizontal subscriber limits so clearly infringed cable operators' First Amendment rights that there are "no circumstances under which the FCC could adopt constitutionally compatible regulations." 835 F. Supp. at 10. CU claims that four post-1993 court decisions have

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[5] *See, e.g.*, *Stewart v. General Motors Corp.*, 756 F.2d 1285, 1291 (7th Cir. 1985) (citing cases); Although initially conceding that it has the burden of persuasion, *see* Motion at 7 ("party seeking to lift the stay must demonstrate . . ."), CU later suggests the opposite, *see id.* ("burden for issuance of a stay is on the moving party. This is a continuing obligation; if the movant cannot show that it continues to satisfy the stringent standards required for a stay, the stay must be lifted"). CU is confused – the Commission adopted the stay *sua sponte* and obviously has no burden here, as the lead authority cited by CU confirms. *See Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) (lower court injunction would be stayed only if movants demonstrated that competing equities "strongly tipped" in their direction). The other decisions discussed by CU are inapposite. *See Resolution Trust Corp. v. Cohen*, 1994 WL 191734 (D.C. Cir. May 10, 1994) (party seeking stay from court of appeals has burden); *JB & LE Venture v. Mutual Life Ins. Co. of New York*, 1998 U.S. App. LEXIS 4668 (9th Cir.) (discussing burden of lifting statutory automatic bankruptcy stay to proceed with foreclosure proceeding).

strengthened the Commission's First Amendment hand.[6] Quite the opposite is true. Most fundamentally, the Supreme Court's *Turner* cases rejected the principal argument advanced by the Commission in the district court – that the horizontal ownership limit was subject to only deferential rational basis review. Governmental interferences with cable operators' editorial function "pose a particular danger of abuse by the State and so are *always* subject to at least some degree of *heightened* First Amendment scrutiny." *Turner I*, 512 U.S. at 640-41 (emphasis added). Even "content neutral" regulations of cable speech must "advance[] important governmental interests unrelated to the suppression of free speech and . . . not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. Thus, even if the Commission can convince the Court of Appeals that a rule that *prohibits* speech by large MSOs is content neutral, there is a substantial likelihood that the Court will conclude that the stayed rule fails to address a real, non-conjectural problem in any appropriately tailored way. This is especially so, given that in the district court, the government, relying on its rejected deferential review theory, declined to submit evidence that the stayed rule advances important governmental interests and is appropriately tailored.

Tellingly, CU does not even describe the court challenges to the rule itself. Among other things, Time Warner (the petitioner in the Court proceeding) points out that the rule's arbitrary "homes passed" formula is inconsistent with the Commission's own stated goal of measuring

[6] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"); *Bell South Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998); *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996). All four decisions preceded the Commission's 1998 denial of CU's prior request to lift the stay.

market power.[7] In its responsive brief, the Commission does not deny that the homes passed measure is flawed and urges that consideration of that challenge is premature precisely because the Commission "is currently in the process of considering whether the rule should take account of all MVPDs rather than cable operators alone, and whether it should be based on actual subscriber numbers rather than homes passed."[8] Thus, on the record before the Court, there is little likelihood that the stayed rule will be sustained on the merits, if the Court of Appeals reaches the merits. And if the Court of Appeals does not reach the merits, it will only be because the Commission has changed the rule. In either case, CU's suggestion that the flawed rule should nonetheless be applied now makes absolutely no sense.

On the record before the Commission, it is even more obvious that the stayed rule is arbitrary and would harm consumers if enforced. In this regard, there have been significant changes since the rule was adopted (and promptly stayed) six years ago, including: (1) the emergence of significant competitors to cable, particularly direct broadcast satellite ("DBS"); (2) the success of other existing cable restrictions, including the program carriage, leased access, must carry, channel occupancy, and program access rules, which address the very same behavior targeted by the stayed rule; and (3) the deployment of digital video technology which increases outlets for diverse programming.

[7] *See* Brief for Time Warner Entertainment Company, L.P. in *Time Warner Entertainment Company, L.P.* v. *FCC*, No. 94-1035 *et al.*, at 39-45 (D.C. Cir., filed June 29, 1999).

[8] *See* Brief for the FCC and the United States in *Time Warner Entertainment Company, L.P.* v. *FCC*, No. 94-1035 *et al.* at 47 n.16 (D.C. Cir., filed August 13, 1999).

AT&T has addressed these changes at length elsewhere.[9] However, the emergence and growth of non-cable multi-video programming distributors ("MVPDs"), in particular, cannot be overemphasized. In 1993, cable systems faced few direct competitors. Today, 15 million people get their programming from a company *other* than their cable operator.[10] DBS did not exist when the stayed rule was adopted, and today every household in America can choose to obtain programming from a DBS provider. Two of the seven largest MVPDs – DirecTV and Echostar – are DBS companies.[11] It is no wonder, then, that the Justice Department recently found that consumers view DBS and cable as "substitutable services."[12]

In its *Second Reconsideration Order*, the Commission acknowledged what has become obvious: that as "alternative MVPDs continue to grow in the future, the number of homes passed by a cable operator may become an increasingly inaccurate measure of its actual subscribership and thus of its actual market power" (*id.* ¶ 84); that "[t]he homes passed standard is . . . difficult to apply" (*id.* ¶ 85); that "the growth of MVPDs other than cable operators . . . suggest[s] that a true measure of horizontal concentration ought to take into account all MVPDs and MVPD subscribers, rather than cable operators and cable subscribers alone" (*id.* ¶ 80); and that the homes passed standard "is a particularly inaccurate measure of market power for a new

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[9] *See* Public Interest Statement of AT&T Corp. and MediaOne Group, Inc., Docket No. CS 99-251 at 46-54; 64-65 (FCC, filed July 7, 1999) ("AT&T-MediaOne Public Interest Statement"); Comments of TCI, MM Docket No. 92-264, at 9-44 (FCC, filed Aug. 14, 1998).

[10] *See* Comments of AT&T Corp. CS Docket No. 99-230, at 1-21 (Aug. 4, 1999). *See also* AT&T-MediaOne Public Interest Statement at 46-54.

[11] DBS is growing 20 times as fast as cable and winning two of every three new customers. Analysts predict that DBS will capture over 20 million subscribers in the next few years and nearly half of all MVPD subscribers over the next decade. *See* Comments of AT&T Corp., CS Docket No. 99-230, at 4-7 (FCC, filed Aug. 4, 1999).

[12] Complaint, *United States v. Primestar, Inc.*, No. 1:98CV01193, ¶ 63 (D.D.C. May 12, 1998).

MVPD" (*id.* ¶ 85). The Commission therefore proposed a new formula for calculating an MSO's horizontal concentration based on all MVPD subscribers, not cable homes passed. *Id.* ¶¶ 79, 81 ("By recognizing the impact of all purchasers of video programming, not just cable operators, this rule revision would provide a more accurate measure of MSOs' market power"). Commission precedent dictates that the appropriate course in such circumstances is to maintain the stay of a rule during the pendency of a proceeding that proposes a change in that rule.[13] Here, given the Commission's express recognition of the flaws in the suspended rule, and its proposal to change the rule, it would be arbitrary and capricious to do anything else.

B. Balance of Harms

The balance of harms also clearly favors retaining the Stay. Unless a waiver were granted, application of the stayed rule could require AT&T to divest ownership of certain cable systems. Once divested, those systems would be practically, if not totally, impossible to reacquire. If the rule was then ultimately changed – as the Commission's own statements confirm is likely – or overturned on appeal, AT&T irreparably would have lost access to those cable systems as vehicles to provide competitive local telephone services to consumers. As the Commission has previously recognized, the potential harm of requiring divestiture of business

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[13] *See, e.g.*, Order, *In re International Record Carriers' Scope of Operations*, 58 FCC.2d 266 (1976); Order, *In re Mobilcom Pittsburgh, Inc.*, 9 FCC Rcd. 4101 (1994); Interim Order, *In re Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System*, 62 FCC 2d 950, 951 (1977); Order, *Matter of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, 11 FCC Rcd. 856, 857 (1995). In *Daniels Cablevision, supra*, the court also struck down the provision of the 1992 Cable Act calling for public interest requirements for DBS operators. The Commission voluntarily stayed implementation of any rules in this area pending the final outcome on appeal. Only after the appellate court (three years later) reversed the lower court's ruling and found the underlying statute to be constitutional did the Commission proceed with its rulemaking to implement the DBS public interest requirements.

assets pursuant to a rule that may yet be overturned on appeal constitutes irreparable harm justifying the imposition of a stay.[14]

In contrast, keeping the Stay in place poses no harm to the public interest (CU does not even claim any harm to itself). CU's contention that harm to the public is "imminent" because after September 17, 1999, "the Commission will be free to act upon AT&T's application" (Motion at 3) ignores not only that approval of the proposed transfers will *benefit*, not harm consumers, but that it is the Commission that largely controls when to approve transfers that are in the public interest. Thus, even if CU had identified any non-frivolous objections to the transfer of MediaOne's licenses and authorizations to AT&T, there is simply no risk that the public will be denied "statutory protection from anti-competitive abuses," Motion at 4, if the Commission does not vacate the stay by September 17, 1999.

To the contrary, keeping the Stay in place plainly benefits the public. As described above, and in AT&T's prior comments on this issue, the stayed rule imposes arbitrary limits that do not rationally promote Congress' objective of preventing the exercise of market power by cable systems. Enforcement of those arbitrary limits would frustrate pro-competitive acquisitions of cable systems by MSOs that will provide enormous benefits to the public. As AT&T and MediaOne demonstrated in detail in their public interest statement, the combination of their two cable systems – while it might result in more "homes passed" than is permitted by

[14] In *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting*, 26 FCC.2d 28 (1970), the Commission stayed its Network Syndication and Program Practices rules pending judicial review. Compliance with the challenged rules would have required immediate divestiture, subjecting NBC and ABC to "severe commercial and financial damage which could not be repaired should the Commission be overruled by the courts," because there would be "no practicable means of resuming syndication activity short of many years of invested effort and resources." *Id.* at 29-30.

the Commission's stayed horizontal ownership limits – would not harm consumers or competition in any market. It would instead accelerate and broaden the deployment of facilities that can be used to provide local telephone services in competition with incumbent monopolists and to offer consumers a wide array of new high speed Internet and content-enriched services.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

Respectfully submitted,

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August 23, 1999

CERTIFICATE OF SERVICE

I, Anishiya Abrol, do hereby certify that, on this 23th day of August, 1999, I served a copy of the attached document via First Class mail on the following parties:

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